83-1235

Office - Supreme Court, U.S.
FILED
JAN 26 1984
ALEXANDER L. STEVAS,
CLERK

Case No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

JUNE OIL AND GAS, INC. AND COOK OIL AND GAS, INC.,
Plaintiffs-Appellants,

v.

WILLIAM CLARK, SECRETARY OF THE UNITED STATES DEPARTMENT OF THE INTERIOR;

GEORGE FRANCIS, COLORADO STATE DIRECTOR OF THE BUREAU OF LAND MANAGEMENT, DEPARTMENT OF THE INTERIOR;

INTERIOR BOARD OF LAND APPEALS, UNITED STATES DEPARTMENT OF THE INTERIOR; AND

JOSEPH W. GOSS AND JOAN B. THOMPSON, JUDGES THEREOF,

Defendants-Appellees.

ON WRIT OF CERTIORARI FROM
THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

CORRECTED PETITION FOR WRIT OF CERTIORARI

PHILLIP D. BARBER
(PHILIP G. DUFFORD
On the Petition)
WELBORN, DUFFORD & BROWN
1700 Broadway
Denver, Colorado 80290-1199
Telephone: (303) 861-8013
Attorneys for Plaintiffs-Appellants

January 25, 1984

QUESTIONS PRESENTED FOR REVIEW

1. Whether the courts and agency below erred in determining that June Oil and Gas, Inc. and Cook Oil and Gas, Inc. gained a greater probability of successfully obtaining a federal oil and gas lease or an interest in a federal oil and gas lease in violation of the multiple filing provisions of 43 C.F.R. § 3112.5-2.

2. Whether the construction and interpretation of 43 C.F.R. § 3112.5-2, as applied in the decisions below to June Oil and Gas, Inc. and Cook Oil and Gas, Inc., are contrary to, beyond the scope of, and a departure from, the construction and interpretation of that regulation previously adopted by the Department of the Interior, thereby rendering the newest construction and interpretation null, void and unenforceable.

PARTIES

In addition to the parties listed in the caption of this petition, Cecil D. Andrus and James G. Watt were, in their capacity as Secretary of the Interior, defendants below. The current Secretary of the Interior, William Clark, is automatically substituted as a party defendant in this petition.

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED FOR REVIEW	i
PARTIES	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	iv
DECISIONS BELOW	1
JURISDICTION	2
APPLICABLE CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES OR REGULATIONS	2
STATEMENT OF THE CASE	6
JURISDICTION OF THE FEDERAL COURT	9
REASONS FOR ALLOWANCE OF THIS WRIT	9
CERTIFICATE OF SERVICE	14
APPENDIX A	A-1

TABLE OF AUTHORITIES

Cases

	PAGE
Burg v. Horn, 380 F.2d 897 (2d Cir. 1967)	11
Carper v. Frost Oil Co., 72 Colo. 343, 211 P. 370 (1922)	10
Colorado & Utah Coal Company v. Harris, 97 Colo. 309, 49 P.2d 429 (1935)	10
Irvin v. West End Development Company, 481 F.2d 34 (10th Cir. 1973)	11
June Oil and Gas, Inc., et al., 41 IBLA 394 (1979)	2, 7
June Oil and Gas, Inc., et al. v. Andrus, et al and Grynberg, et al. v. Andrus, et al., No. 79-K-1334, 506 F. Supp. 1204 (D. Colo. 1981)	2, 8
June Oil and Gas, Inc., et al. v. Watt, et al., No. 81-1178 (September 23, 1983)	1, 12
Schermerhorn Oil Corp., 72 I.D. 486 (1965)	8, 10, 12
Shell Oil Co. v. Andrus, 100 S.Ct. 1932 (1980)	12
Wooton v. Wooton, 151 F.2d 147, 161 ALR 1027 (10th Cir. 1967)	11
Young v. Bradley, 142 F.2d 658 (6th Cir. 1944)	11

Statutes

43 C.F.R. § 3100.0-5	4
43 C.F.R. § 3102.1-2	6
43 C.F.R. § 3110.1-6(b)	6
43 C.F.R. § 3112.2-1	4
43 C.F.R. § 3112.5-2	i, 5, 7, 8, 9, 10, 12
5 U.S.C. §§ 701, *et seq*	9
28 U.S.C. § 1254	2
30 U.S.C. §§ 181, *et seq*	2, 13
30 U.S.C. § 226	3

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

JUNE OIL AND GAS, INC. AND COOK OIL AND GAS, INC.,
Plaintiffs-Appellants,
v.

WILLIAM CLARK,
SECRETARY OF THE UNITED STATES DEPARTMENT OF THE INTERIOR;

GEORGE FRANCIS,
COLORADO STATE DIRECTOR OF THE BUREAU OF LAND MANAGEMENT, DEPARTMENT OF THE INTERIOR;

INTERIOR BOARD OF LAND APPEALS,
UNITED STATES DEPARTMENT OF THE INTERIOR; AND

JOSEPH W. GOSS AND JOAN B. THOMPSON,
JUDGES THEREOF,

Defendants-Appellees.

CORRECTED PETITION FOR WRIT OF CERTIORARI

June Oil and Gas, Inc. and Cook Oil and Gas, Inc. (hereinafter sometimes referenced collectively as "June Oil and Cook Oil") file this Corrected Petition for Writ of Certiorari:

DECISIONS BELOW

This is an appeal from a decision entered by the United States Court of Appeals for the Tenth Circuit ("Tenth Circuit") in *June Oil and Gas, Inc., et al. v. Watt, et al.*, No. 81-1178 (September 23, 1983). A copy of the Slip Opinion for this case is appended hereto as part of Appendix A. The appeal before the Tenth Circuit was taken from a judgment of the United States District Court for the District of Colorado,

resulting from its Memorandum Opinion and Order in the consolidated cases of *June Oil and Gas, Inc., et al. v. Andrus, et al. and Grynberg, et al. v. Andrus, et al.*, No. 79-K-1334, 506 F. Supp. 1204 (D. Colo. 1981). A copy of that Memorandum Opinion and Order is appended hereto as part of Appendix A. The appeal to the United States District Court for the District of Colorado was taken from a decision of the Interior Board of Land Appeals in *June Oil and Gas, Inc., et al.*, 41 IBLA 394 (1979), a copy of which is appended hereto as part of Appendix A.

The date of the judgment rendered by the Tenth Circuit was September 23, 1983. The date of the Memorandum Opinion and Order entered by the United States District Court for the District of Colorado was January 16, 1981, with its final judgment being entered on January 20, 1981.

JURISDICTION

The statutory provision believed to confer on this Court jurisdiction to review the judgment in question by writ of certiorari is 28 U.S.C. § 1254.

APPLICABLE CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES OR REGULATIONS [1]

The Mineral Lands Leasing Act, 30 U.S.C. §§ 181, *et seq.*, which provides in pertinent part as follows:

> § 181. *Lands Subject to Disposition; Persons Entitled to Benefits; Reciprocal Privileges; Helium Rights Reserved.* Deposits of coal, phosphate, sodium, potassium, oil, oil shale, native asphalt, solid and semisolid bitumen, and bituminous rock (including oil-impregnated rock or sands from which oil is recoverable only by

1. All references to statutes and regulations are as they appeared in 1978.

special treatment after the deposit is mined or quarried) or gas, and lands containing such deposits owned by the United States, including those in national forests, but excluding lands acquired under the Appalachian Forest Act, and those in incorporated cities, towns, and villages and in national parks and monuments, those acquired under other Acts subsequent to February 25, 1920, and lands within the naval petroleum and oil-shale reserves, except as hereinafter provided, shall be subject to disposition in the form and manner provided by this chapter to citizens, or to any corporation organized under the laws of the United States, or of any State or Territory thereof, or in the case of coal, oil, oil shale, or gas to municipalities. Citizens of another country, the laws, customs, or regulations of which deny similar or like privileges to citizens or corporations of this country, shall not by stock ownership, stock holding, or stock control, own any interest in any lease acquired under the provisions of this chapter . . .

§ 226. *Lease of Oil and Gas Lands — Authority of Secretary.*

(a) All lands subject to disposition under this chapter which are known or believed to contain oil or gas deposits may be leased by the Secretary.

* * *

Lands not within geologic structure of a producing oil or gas field; first qualified applicant.

(c) If the lands to be leased are not within any known geological structure of a producing oil or gas field, the person first making application for the lease who is qualified to hold a lease under this chapter shall be entitled to a lease of such lands without competitive bidding. Such leases shall be conditioned upon the payment by the lessee of a royalty of 12½ per centum in amount or value of the production removed or sold from the lease.

The following regulations, published in Title 43 C.F.R., are relevant to this case:

§ 3100.0-5 *Definitions*

(b) Sole party in interest. A sole party in interest in a lease or offer to lease is a party who is and will be vested with all legal and equitable rights under the lease. No one is, or shall be deemed to be, a sole party in interest with respect to a lease in which any other party has any of the interests described in this section. The requirement of disclosure in an offer to lease of an offeror's or other parties' interest in a lease, if issued, is predicated on the departmental policy that all offerors and other parties having an interest in simultaneously filed offers to lease shall have an equal opportunity for success in the drawings to determine priorities. Additionally, such disclosures provide the means for maintaining adequate records of acreage holdings of all such parties where such interests constitute chargeable acreage holdings. An "interest" in the lease includes, but is not limited to, record title interests, overriding royalty interests, working interests, operating rights or options, or any agreements covering such "interests." Any claim or any prospective or future claim to an advantage or benefit from a lease, and any participation or any defined or undefined share in any increments, issues, or profits which may be derived from or which may accrue in any manner from the lease based upon or pursuant to any agreement or understanding existing at the time when the offer is filed, is deemed to constitute an "interest" in such lease.

§ 3112.2-1 *Offer to lease.*

(a) Entry Card. Offers to lease such designated leasing units by parcel numbers must be submitted on a form approved by the Director, "Simultaneous Oil

and Gas Entry Card" signed and fully executed by the applicant or his duly authorized agent in his behalf. The entry card will constitute the applicant's offer to lease the numbered leasing unit by participating in the drawing to determine the successful drawee.

(1) The entry card must be accompanied by a remittance covering the filing fee of $10. The filing fee may be paid in cash or by money order, bank draft, bank cashier's check or check.

(2) Only one complete leasing unit, identified by parcel number, may be included in one entry card. Lands not on the posted list may not be included. An offeror (applicant) is permitted to file only one offer to lease (entry card) for each numbered parcel on the posted list. Submission of more than one entry card by or on behalf of the offeror for any parcel on the posted list will result in the disqualification of all the offers submitted by that applicant for that particular parcel.

(3) Three entry cards will be drawn for each numbered leasing unit, and the order in which they are drawn will fix the order in which the successful drawee will be determined. Where less than three entry cards have been filed, all cards will be drawn to determine priority.

(4) Unsuccessful drawees will be notified by the return of their respective entry cards.

§ 3112.5-2 *Multiple filings.*

When any person, association, corporation, or other entity or business enterprise files an offer to lease for inclusion in a drawing, and an offer (or offers) to lease is filed for the same lands in the same drawing by any person or partly [sic] acting for, on behalf of, or in collu-

sion with the other person, association, corporation, entity or business enterprise, under any agreement, scheme, or plan which would give either, or both, a greater probability of successfully obtaining a lease, or interest therein, in any public drawing, held pursuant to § 3110.1-6(b), all offers filed by either party will be rejected. Similarly, where an agent or broker files an offer to lease for the same lands in behalf of more than one offeror under an agreement that, if a lease issues to any of such offerors, the agent or broker will participate in any proceeds derived from such lease, the agent or broker obtains thereby a greater probability of success in obtaining a share in the proceeds of the lease and all such offers filed by such agent or broker will also be rejected. Should any such offer be given a priority as a result of such a drawing, it will be similarly rejected. In the event a lease is issued on the basis of any such offer, action will be taken for the cancellation of all interests in said lease held by each person who acquired any interest therein as a result of collusive filing unless the rights of a bonafide purchaser as provided for in § 3102.1-2 intervene, whether the pertinent information regarding it is obtained by or was available to the Government before or after the lease was issued.

STATEMENT OF THE CASE

June Cook and Michael C. B. Cook were married in 1955. They executed a prenuptial agreement which provides in essence that all assets then owned or acquired in the future by each party were to remain the separate property of each party.

June Cook and Michael Cook are citizens of the Netherlands and Great Britain, respectively.

June Oil and Cook Oil are Colorado corporations established by the parties. June Cook owns 100% of the stock of June Oil and Michael Cook owns 100% of the stock of Cook

Oil. At the time the lease offers in dispute herein were made, the officers of June Oil and Cook Oil were as follows:

Officer	June Oil and Gas, Inc.	Cook Oil and Gas, Inc.
President/Director	Michael C. B. Cook	June Cook
Secretary/Treasurer/ Director	Adrianna van der Stock	Adrianna van der Stock
Vice President for Land Administration	Madeline A. Meyer	Kati P. Ward

Also, at the time of the subject drawings, June Cook served as Chairman of the Board of Directors of June Oil and Michael Cook served as Chairman of the Board of Directors of Cook Oil.

In mid-1978, June Oil and Cook Oil each filed drawing entry cards on two parcels of land located in Colorado denominated Parcel CO-337 and Parcel CO-361. Each of the companies sought to obtain oil and gas leases on the lands within those parcels. Neither June Cook nor Michael Cook filed individual lease offers in any of the drawings in question. The entry cards submitted by Cook Oil were signed by Kati P. Ward; those filed by June Oil were signed by Madeline A. Meyer. The results of the drawings were as follows: June Oil received first priority on Parcel CO-337 and second priority on Parcel CO-361. Cook Oil received no priority on Parcel CO-337, but received first priority on Parcel CO-361.

On August 31, 1978, the Colorado Bureau of Land Management ("BLM"), after review of the qualifications filed for each corporation, issued a decision rejecting the priority offers, citing a multiple filing by the companies in violation of 43 C.F.R. § 3112.5-2.

June Oil and Cook Oil appealed the BLM decision to the Interior Board of Land Appeals ("IBLA"), which consolidated the cases for review. The IBLA upheld the decision of the BLM. *June Oil and Gas, Inc., et al.*, 41 IBLA 394 (1979).

June Oil and Cook Oil appealed the BLM and IBLA decisions to the United States District Court for the District

of Colorado. That court determined that defendants' motions for summary judgment should be granted. June Oil and Cook Oil's motion for summary judgment was denied. *June Oil and Gas, Inc., et al. v. Andrus, et al. and Grynberg, et al. v. Andrus, et al.*, 506 F. Supp. 1204 (D. Colo. 1981). The district court determined that the BLM and IBLA had not acted arbitrarily, capriciously or not in accordance with the law in rejecting the priority offers. Thereafter, the district court entered final judgment, dismissing the June Oil and Cook Oil cause of action. The district court did not modify the IBLA's conclusions. It entered judgment accordingly.

Among the IBLA's findings were the following: June Oil and Cook Oil, as corporations, had both filed offers in the identical simultaneous oil and gas lease drawings. The officers in each of the two corporations had authority to file offers and execute leases on behalf of the other corporation; i.e., June Cook could file for Cook Oil and Gas, Inc. and Michael Cook could file for June Oil and Gas, Inc. Further, the IBLA found that the two corporations had similar articles of incorporation, maintained the same business address, and shared business facilities and personnel for purposes of convenience. Based upon these facts and the perceived interrelatedness of the two corporations, the IBLA concluded that the corporations were sufficiently interrelated to make the drawings inherently unfair and further concluded that the offers filed by each corporation were prohibited by 43 C.F.R. § 3112.5-2, dealing with multiple filings. The IBLA relied on *Schermerhorn Oil Corp.*, 72 I.D. 486 (1965) in finding a prohibited multiple filing. Although the IBLA agreed with plaintiffs that *Schermerhorn* was distinguishable in part (since in *Schermerhorn* one corporation filing for a lease owned part of another corporation filing for the same parcel and here no such common ownership arrangement existed), the IBLA relied on *Schermerhorn* to reject the priorities of June Oil and Cook Oil because of the alleged interrelatedness of the corporations.

The IBLA also based its decision, in part, on the theory that common officers breach their fiduciary duty to the corporation when both corporations file lease offers on the same parcel of land. The reasoning was that when a business opportunity, such as filing for an oil and gas lease, arises which is equally appropriate for either corporation, the directors cannot take the opportunity for one of the corporations without breaching their duty to the other unless the corporations are in fact not competing and the action is beneficial to both regardless of in whose name the action is taken. The IBLA stated that such dual filings could be justified only if the filings were beneficial to both corporations, i.e., if the filings increased each corporation's chance of being awarded a lease or an interest therein. Thus, the IBLA upheld the BLM's rejection of the offers made by June Oil and Cook Oil as prohibited multiple filings.

The Tenth Circuit and the district court affirmed on the bases of the reasoning in the IBLA ruling.

JURISDICTION OF THE FEDERAL COURT

The basis for federal jurisdiction in the United States District Court for the District of Colorado was the Administrative Procedure Act, 5 U.S.C. §§ 701, *et seq.*

REASONS FOR ALLOWANCE OF THIS WRIT

I. WHETHER THE COURTS AND AGENCY BELOW ERRED IN DETERMINING THAT JUNE OIL AND GAS, INC. AND COOK OIL AND GAS, INC. GAINED A GREATER PROBABILITY OF SUCCESSFULLY OBTAINING A FEDERAL OIL AND GAS LEASE OR AN INTEREST IN A FEDERAL OIL AND GAS LEASE IN VIOLATION OF THE MULTIPLE FILING PROVISIONS OF 43 C.F.R. § 3112.5-2.

Neither of the two bases relied upon by the courts and agency below is sufficient to deny the lease offers submitted

by June Oil and Cook Oil. *Schermerhorn*, and the BLM's theory of inherent unfairness based upon the alleged interrelatedness of June Oil and Cook Oil, do not apply to this case. *Schermerhorn* and other similar cases involved the situation where a company owned stock or other beneficial interest in another company filing in the same simultaneous drawing. In that manner, the company which owned stock in the other would benefit if either of the two companies drew a priority on the lease. The record affirmatively discloses that neither June Oil nor Cook Oil owned a beneficial interest of any kind in the other. Thus, no unfair advantage of the type present in *Schermerhorn* was gained in the filing by either company and no violation of 43 C.F.R. § 3112.5-2 took place.

The second basis of the decisions below, that a breach of the fiduciary duty owed to June Oil and Cook Oil by their directors created a situation of constructive trust giving the other company an additional opportunity to gain a lease, is unsupported by evidence in the record, by the applicable regulations or by case law. Only when a corporate employee or director competes in a substantial and unfair manner with the corporation, for an opportunity which rightfully belongs to the corporation, is there a breach of trust. No such competition existed in this case. Both June Oil and Cook Oil filed on the same parcels. Their probability of success was equal.

Generally, a corporate officer or employee *may* engage in a business which is in competition with his employer's activities if, (1) the officer or employee is not using information which was gained by the officer or employee as a direct result of his acting in an employment capacity, and (2) the corporation has no "expectancy" of the opportunity. *Colorado & Utah Coal Company v. Harris*, 97 Colo. 309, 49 P.2d 429 (1935) (corporate officer acquiring a mining lease on lands in which corporation had no "expectancy" did not comprise unlawful competition or usurpation of corporate opportunity); *Carper v. Frost Oil Co.*, 72 Colo. 343, 211 P. 370 (1922) (no constructive trust on oil and gas lease obtained by

president and officer of corporation where the president learned of lease in individual capacity and obtaining it would not defeat the plans and purposes of the corporation); *Burg v. Horn*, 380 F.2d 897 (2d Cir. 1967) (no duty imposed on officers or directors who engaged in similar business to that of corporation to offer all opportunities to the corporation where certain opportunities did not come to officers' attention through corporation). The evidence in the record fails to disclose the "expectancy" of either June Oil or Cook Oil in the subject leases. Both companies filed lease offers in a lottery where each company enjoyed an equal chance of prevailing. The record does not disclose how the knowledge of the lease opportunity came to the persons who filed those offers, and affirmatively discloses that the lease offers were signed by an officer (Vice President for Land Administration) from each company who held no position and had no stock ownership in the other company. Therefore, no violation of a fiduciary duty took place.

In the case at bar, "substantial competition" between the officers and the corporation did not exist, as no officers filed lease offers in their individual capacity. The cases in which unlawful competition has been found involved cases in which a trustee or other fiduciary acquired property without informing the trust or other entity, in the course of performing duties in his fiduciary capacity, and in cases where the fiduciary was the trust's or other entity's only competition. *See Wooton v. Wooton*, 151 F.2d 147, 161 ALR 1027 (10th Cir. 1967); *Irvin v. West End Development Company*, 481 F.2d 34 (10th Cir. 1973); *Young v. Bradley*, 142 F.2d 658 (6th Cir. 1944). The evidence in the record does not in any way show that either corporation, or any of their corporate officers, breached a fiduciary duty. No untoward conduct on the part of any officer was shown. Both filings involved hundreds of other competitors, thus no unfair or even substantial competition was present between June Oil and Cook Oil. Therefore, the reasoning of the courts and agency below is unsupported by evidence in the record or by controlling case law regarding fiduciary duties.

II. WHETHER THE CONSTRUCTION AND INTERPRETATION OF 43 C.F.R. § 3112.5-2, AS APPLIED IN THE DECISIONS BELOW TO JUNE OIL AND GAS, INC. AND COOK OIL AND GAS, INC., ARE CONTRARY TO, BEYOND THE SCOPE OF, AND A DEPARTURE FROM, THE CONSTRUCTION AND INTERPRETATION OF THAT REGULATION PREVIOUSLY ADOPTED BY THE DEPARTMENT OF THE INTERIOR, THEREBY RENDERING THE NEWEST CONSTRUCTION AND INTERPRETATION NULL, VOID AND UNENFORCEABLE.

No rule has ever been promulgated by the Department of the Interior which prevents companies with common board members from filing offers on identical parcels in simultaneous oil and gas lotteries. The decisions below essentially rule that a breach of fiduciary duty occurs whenever a person who owns an economic interest in only *one* company, and serves as a director or officer of another company, engages in business on behalf of either company. This ruling is a significant departure from previous interpretations of 43 C.F.R. § 3112.5-2. (*See Schermerhorn*, where economic interest in *both* companies was basis of decision.) The significance of the decisions below can be seen in that those decisions may prevent any oil company or other entity from competing for federal oil and gas leases in any situation where another company with a common officer, director or shareholder also competes. Because of the significant departure from previous interpretations of the cited regulation, the decisions below are not in accordance with prior law and deprive June Oil and Cook Oil of their vested property rights. *See generally Shell Oil Co. v. Andrus*, 100 S.Ct. 1932 (1980).

The Tenth Circuit held that under the facts of this case "corporate officers breach their fiduciary duty to a corporation when they file lease offers on behalf of other corporations." *June Oil and Gas, Inc., et al. v. Watt, et al.*, Slip Op. at 7. This ruling, if allowed to stand, would disqualify nearly every oil and gas company of any size from doing business in

the federal oil and gas leasing system. The parameters of the Tenth Circuit decision are limitless. Under that decision any oil company, which has as an officer or director or shareholder any person who owns any interest in any other oil company, is prohibited from doing business in any area of the oil and gas industry in which that person or that other company has any interest. This ruling could potentially cripple the oil and gas industry, as it would either (1) eliminate interlocking directorates or the ability of persons with oil and gas expertise from serving on boards of companies other than their own, or (2) prohibit oil and gas companies with such interlocking directorates, common directors or shareholders from filing offers for federal oil and gas leases. That result was surely not the intent of Congress in passing the Mineral Leasing Act, 30 U.S.C. §§ 181, *et seq.* The decisions below must be reversed.

WHEREFORE, this Corrected Petition for Writ of Certiorari is filed this 25th day of January, 1984.

Respectfully submitted,

WELBORN, DUFFORD & BROWN

By: Phillip D. Barber

PHILLIP D. BARBER
(PHILIP G. DUFFORD
On The Petition)
1700 Broadway
Denver, Colorado 80290-1199
Telephone: (303) 861-8013
Attorneys for
Plaintiffs-Appellants

CERTIFICATE OF SERVICE

I, Phillip D. Barber, certify that I am a member of the bar of this Court and that on January 25, 1984, pursuant to Rule 28 of the Rules of the Supreme Court of the United States, I caused to be mailed the requisite number of copies of the foregoing Corrected Petition for Writ of Certiorari, by first class mail, postage prepaid, to the following Defendants-Appellees:

William Clark, Secretary
United States Department of the Interior
18th and C Streets NW
Washington, D.C. 20240

George Francis
Colorado State Director
Bureau of Land Management
United States Department of the Interior
1037 - 20th Street
Denver, Colorado 80294

Interior Board of Land Appeals
United States Department of the Interior
4015 Wilson Blvd.
Arlington, Virginia 22203

Honorable Joseph W. Goss
Administrative Judge
Interior Board of Land Appeals
Office of Hearings and Appeals
4015 Wilson Blvd.
Arlington, Virginia 22203

Honorable Joan B. Thompson
Administrative Judge
Interior Board of Land Appeals
Office of Hearings and Appeals
4015 Wilson Blvd.
Arlington, Virginia 22203

Solicitor General
Department of Justice
Washington, D.C. 20530

I certify that on January 25, 1984, pursuant to Rule 28 of the Rules of the Supreme Court of the United States, I caused to be served by first class mail, postage prepaid, the requisite number of copies of the foregoing Corrected Petition for Writ of Certiorari on the following counsel of record:

Arthur E. Gowran
Assistant Attorney General
Land and Natural Resources Division
Department of Justice
Washington, D.C. 20530

Joseph F. Dolan
United States Attorney
Richard A. Jost
Assistant United States Attorney
1200 Federal Building
Drawer 3615
Denver, Colorado 80204

Edward J. Shawaker
Martin W. Matzen
United States Department of Justice
Room 2343
Washington, D.C. 20530

Harold Baer
Office of the Solicitor
Department of the Interior
Denver Federal Center
P.O. Box 25007
Denver, Colorado 80225

I certify that all parties required to be served have been served.

Phillip D. Barber

APPENDIX A

9-23-83 81-1178

United States Court of Appeals
For the Tenth Circuit

SLIP OPINION

PUBLISH

United States Court of Appeals

TENTH CIRCUIT

JUNE OIL AND GAS, INC.
AND
COOK OIL AND GAS, INC.,

Plaintiffs-Appellants

v. No. 81-1178

JAMES G. WATT, SECRETARY OF THE UNITED STATES DEPARTMENT OF THE INTERIOR, ET AL.,

Defendants-Appellees

Appeal from the United States District Court
for the District of Colorado
(D.C. No. 79-K-1334)

Philip G. Dufford and Phillip D. Barber, Welborn, Dufford, Cook & Brown, Denver, Colorado, *for Plaintiffs-Appellants*

Carol E. Dinkins, Assistant Attorney General, Kathryn A. Oberly and Arthur E. Gowran, Attorneys, Department of Justice, Washington, D.C.; Joseph F. Dolan, United States Attorney, Richard A. Jost, Assistant United States Attorney, *for Defendants-Appellees*

Before DOYLE, McKAY and SEYMOUR, *Circuit Judges*

DOYLE, *Circuit Judge*

After examining the briefs and the appellate record, this three-judge panel has determined unanimously that oral argument would not be of material assistance in the determination of this appeal. *See* Fed.R.App.P. 34(a); Tenth Circuit R. 10(e). The cause is therefore ordered submitted without oral argument.

Appellants appeal from an unfavorable Colorado District Court judgment and order in two consolidated cases, namely, June Oil and Gas, Inc., et al v. Andrus, et al, No. 81-1178, and Grynberg, et al v. Andrus, No. 81-1315. The cases were separated for review. In the district court defendant Department of Interior, Bureau of Land Management (hereinafter BLM) and plaintiffs June Oil and Gas, Inc. and Cook Oil and Gas, Inc. (hereinafter June Oil), each moved for summary judgment. The court granted the BLM's motion and denied June Oil's motion.

FACTS

June Cook and Michael C. B. Cook were married in 1955. They executed a pre-nuptial agreement which provides in essence that all assets then owned or acquired in the future by each party were to remain the separate property of each party. June Cook and Michael Cook are citizens of the Netherlands and Great Britain, respectively.

June Oil and Cook Oil are Colorado corporations established by the parties. June Cook owns 100% of the stock of June Oil and Michael Cook owns 100% of the stock of Cook Oil. At the time the lease offers in dispute herein were made the officers of June Oil and Cook Oil were as follows:

Officers	June Oil and Gas, Inc.	Cook Oil and Gas, Inc.
President/Director	Michael C. B. Cook	June Cook
Secretary/Treasurer/ Director	Adrianna van der Stock	Adrianna van der Stock
Vice President for Land Administration	Madeline A. Meyer	Kati P. Ward

Also, at the time of the subject drawings, June Cook served as Chairman of the Board of Directors of June Oil and Michael Cook served as Chairman of the Board of Directors of Cook Oil.

In mid-1978, June Oil and Cook Oil filed drawing entry cards on two parcels of land located in Colorado denominated CO-337 and CO-361. Each of the companies sought to obtain oil and gas leases on the lands. Neither June Cook nor Michael Cook filed individual lease offers in any of the drawings in question. The entry cards submitted by Cook Oil were signed by Kati P. Ward; those filed by June Oil were signed by Madeline A. Meyer. The results of the drawings were as follows: June Oil received first priority on CO-337 and second priority on CO-361. Cook Oil received no priority on CO-337, but received first priority on CO-361.

On August 31, 1978, the BLM, after review of the qualifications file for each corporation, issued a decision rejecting the priority offers, citing a multiple filing by the companies in violation of 43 C.F.R. §3112.5-2 (1978).

June Oil and Cook Oil appealed the BLM's decision to the Interior Board of Land Appeals (hereinafter the IBLA), which consolidated the cases for review. The IBLA upheld the decision of the BLM. 41 I.B.L.A. 394 (1979).

The Cooks appealed the BLM and IBLA decisions to the United States District Court for the District of Colorado. That court determined that defendants' motions for summary judgment should be granted. The Cooks' motion for summary judgment was denied. 506 F.Supp. 1204 (D.Colo. 1981). The district court determined that the BLM and IBLA had not acted arbitrarily, capriciously or not in accordance with the law in rejecting the priority offers. Thereafter, the district court entered final judgment, dismissing the Cooks' cause of action. This appeal followed.

The district court did not modify the IBLA's conclusions. It entered judgment accordingly.

Among the IBLA's findings were the following: June Oil and Cook Oil, as corporations, had both filed offers in the identical and simultaneous oil and gas lease drawings. The directors in each of the two corporations had authority to file offers and execute leases on behalf of the other corporation. Further, the two corporations had similar articles of incorporation, maintained the same business address, and shared business facilities and personnel for purposes of convenience. Based upon these facts the IBLA concluded that the corporations were sufficiently interrelated to make the drawings inherently unfair and the offers were prohibited by 43 C.F.R. §3112.5-2 (1978) dealing with multiple filings. The IBLA relied on *Schermerhorn Oil Corp.*, 72 I.D. 486 (1965) in finding a prohibited multiple filing. Although the IBLA agreed with plaintiffs that *Schermerhorn* was distinguishable in part (since in *Schermerhorn* one corporation filing for a lease owned part of another corporation filing for the same parcel and here no such common ownership arrangement exists) the board relied on *Schermerhorn* to reject the priorities of June Oil and Cook Oil because of the interrelatedness of the corporations. In *Schermerhorn*, the two corporations filing were interrelated in a similar way.

The IBLA based its decision, in part, on the theory that common officers breach their fiduciary duty to the corporation when both corporations file lease offers in the same parcel of land. The reasoning was that when a business opportunity, such as filing for an oil and gas lease, arises which is equally appropriate for either corporation, the directors cannot take the opportunity for one of the corporations without breaching their duty to the other unless the corporations are in fact not competing and the action is beneficial to both regardless of in whose name the action is taken. The IBLA stated that such dual filings could be justified only if they were beneficial to both corporations, i.e., if they increased each corporation's chance of being awarded a lease or an interest therein. Thus, the IBLA upheld the BLM's

rejection of the offers made by June Oil and Cook Oil as prohibited multiple filings.

* * *

June Oil's argument was that neither of the two bases relied upon by the district court and BLM is sufficient to deny the lease offers submitted by June Oil and Cook Oil. *Schermerhorn Oil Corp., supra,* and the BLM's theory of inherent unfairness based upon the alleged interrelatedness of June Oil and Cook Oil, do not apply to the facts of this case, according to appellant. It distinguishes *Schermerhorn* and other similar cases, saying that they involved a situation in which a company owned stock or other beneficial interest in another company filing in the same lottery. In that manner, the company which owned stock in the other would benefit if either of the two companies drew a priority on the lease. Here June Oil points out that neither June Oil nor Cook Oil owned a beneficial interest of any kind in the other.

Thus June Oil maintains that no unfair advantage was gained in the filing by either or both companies.

The second basis of the decision, that a breach of the fiduciary duty owed June Oil and Cook Oil by their directors gave the other company an additional opportunity to gain a lease, is also unsupported by evidence in the record, by the regulation, or by case law, June Oil argues. Only when a corporate employee or director competes in a substantial manner with the corporation, is there a breach of trust. No such competition existed in this case, according to June Oil.

June Oil also argues that the district court and the IBLA irrationally distinguish between the permitted filings by husbands and wives, and the filings in this case. Had June Cook and Michael Cook been American citizens, they could have filed individually and won the leases. Yet, June Oil maintains, the agency decision denies two corporations with no joint interest the right to file on the same parcel.

We disagree with the position which June Oil and also Cook Oil have taken. The reason is plain. June and Michael Cook were fiduciaries in each other's corporation. As the IBLA stated, corporate officers breach their fiduciary duty to a corporation when they file lease offers on behalf of other corporations.

Inasmuch as both June Cook and Michael Cook owe a fiduciary duty to the corporation of the other, we are constrained to affirm the judgments of the IBLA and of the district court.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

JUNE OIL AND GAS, INC., AND
COOK OIL AND GAS, INC.,

Plaintiffs,

v.

CIVIL ACTION
No. 79-K-1334

CECIL D. ANDRUS, SECRETARY OF THE INTERIOR OF THE UNITED STATES; DALE R. ANDRUS, COLORADO STATE DIRECTOR OF THE BUREAU OF LAND MANAGEMENT, DEPARTMENT OF THE INTERIOR; INTERIOR BOARD OF LAND APPEALS, UNITED STATES DEPARTMENT OF THE INTERIOR, AND JAMES L. BURSKI, EDWARD W. STUBBING AND JOAN B. THOMPSON, JUDGES THEREOF,

Defendants.

CELESTE C. GRYNBERG AND DEAN G. SMERNOFF AS CO-TRUSTEES FOR THE STEPHEN MARK GRYNBERG TRUST,

Plaintiffs,

v.

CIVIL ACTION NO. 79-K-1771

CECIL D. ANDRUS, SECRETARY OF THE INTERIOR OF THE UNITED STATES; DALE R. ANDRUS, COLORADO STATE DIRECTOR OF THE BUREAU OF LAND MANAGEMENT, DEPARTMENT OF THE INTERIOR; INTERIOR BOARD OF LAND APPEALS, UNITED STATES DEPARTMENT OF THE INTERIOR, AND JOSEPH W. GOSS AND JOAN B. THOMPSON, JUDGES THEREOF,

Defendants.

MEMORANDUM OPINION AND ORDER

Kane, J.

This action is a consolidation of two cases involving three plaintiffs, June Oil and Gas, Inc., (June Oil), Cook Oil and Gas, Inc., (Cook Oil) and Celeste C. Grynberg and Dean G. Smernoff as co-trustees for the Stephen Mark Grynberg Trust (Grynberg Trust). The facts in each case are different; however both allege that they were denied oil and gas leases, although their drawing entry cards or offers received priority in the lottery, and such denials were an abuse of discretion, arbitrary, capricious, and otherwise not in accordance with law. Plaintiffs' contend that the Secretary of the Interior ignored established legal principles and the plain meaning and intent of the prohibition against multiple filings contained in 43 C.F.R. 3112.5-2. Both cases are before the court on cross motions for summary judgment.

FACTS

The Grynberg Trust

The Stephen Mark Grynberg Trust was established on August 1, 1969 by Jack Grynberg for his son Stephen Mark. Companion trusts were also established by the same instrument for Stephen's siblings Rachel Susan and Mariam Lela. These irrevocable discretionary support trusts are managed by co-trustees Dean G. Smernoff and Celeste C. Grynberg, the children's mother. In February 1978, drawing entry cards were filed for parcel CO-167 by each of the three trusts, Jack Grynberg and Celeste Grynberg. The Stephen Mark Trust received first priority on the parcel.

The Bureau of Land Management rejected all five offers as violative of the regulatory prohibition against multiple filings found at 43 C.F.R. 3112.5-2. Plaintiffs appealed to the Interior Board of Land Appeals which affirmed the bureau's rejection of the lease offers. *Celeste C. Grynberg, Dean G. Smernoff*, 44 I.B.L.A. 197, 203 (1979). The board reasoned

that simultaneous offers for the same parcel by the children's parents and their trust and by a trustee of a trust and the trust proper both created a prohibited multiple filing under 3112.5-2. *Id.* at 202, 203. Plaintiffs now seek review of the decision, damages, injunctive relief, declaratory relief and extraordinary relief.

June Oil and Gas, Inc. and Cook Oil and Gas, Inc.

In June and July, 1978, June Oil and Cook Oil submitted offers for the simultaneous oil and gas lease drawings held by the Colorado State Office of the Bureau of Land Management. June Oil received first priority on parcel CO-337 and second priority on parcel CO-361, while Cook Oil received first priority on parcel CO-361. The bureau rejected each company's offer concluding that given the common officers, incorporators, address and other factors, the two corporations were interrelated and consequently had gained a greater probability of obtaining a lease. Both corporations appealed the decision and their cases were consolidated for review before the Interior Board of Land Appeals which affirmed the decision. June Oil and Cook Oil now seek review of the decision, damages, injunctive relief, declaratory relief, and extraordinary relief.

SCOPE OF REVIEW

Jurisdiction to review the judgment of defendant board is conferred upon me by the Administrative Procedure Act, 5 U.S.C.A. §§ 701, *et seq.* Judicial review of administrative action is based upon the full administrative record before the agency decision maker at the time the challenged action was taken. I am authorized to conduct a *de novo* review. *Cooperative Services Inc. v. United States Department of Housing and Urban Development*, 562 F.2d 1292, 1295 (D.C. Cir. 1977). *See also Ballard E. Spencer Trust, Inc.* v. *Morton*, 544 F.2d 1067 (10th Cir. 1976). In reviewing the agency's decision, it is not my function to weigh the conflicting evidence adduced at the administrative proceeding, but rather to

determine whether based upon the entire record there is substantial evidence to support the agency's determination. *Nickol* v. *United States*, 501 F.2d 1389 (10th Cir. 1974); *Roberts* v. *Morton*, 389 F.Supp. 87 (D.Colo. 1975), *aff'd* 549 F.2d 158 (10th Cir. 1976), *cert. denied* 434 U.S. 834 (1977).

5 U.S.C.A. §706(2)(a) requires a finding that the agency decision was not arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402, 416 (1971); *Sabin* v. *Butz*, 515 F.2d 1061 (10th Cir. 1975). The burden of proving that agency action is arbitrary and capricious is upon the plaintiff. *Angel* v. *Butz*, 487 F.2d 260, 263 (10th Cir. 1973), *cert. denied* 417 U.S. 967 (1974); *Hiatt Grain & Feed, Inc.* v. *Bergland*, 446 F.Supp. 457, 478-479 (D.Kan. 1978), *aff'd* 602 F.2d 929 (10th Cir. 1979), *cert. denied* 444 U.S. 1073 (1980). To make this finding I must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment. *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. at 416. Although this inquiry must be searching and careful, the standard of review is a narrow one. I am not allowed to substitute my judgment for that of the agency. *Id.*, *American Petroleum Institute* v. *E.P.A.*, 540 F.2d 1023, 1029 (10th Cir. 1976) *cert. denied* 430 U.S. 922 (1977). Rather, I must uphold agency action that has a rational basis for its treatment of the evidence. *Bowman Transportation, Inc.* v. *Arkansas-Best Freight System, Inc.*, 419 281, 290 (1974); *Coleman* v. *Darden*, 595 F.2d 533 (10th Cir. 1979); *American Petroleum Institute* v. *E.P.A.*, 540 F.2d at 1029; *Sabin* v. *Butz*, 515 F.2d at 1061; *Hiatt Grain & Feed, Inc.* v. *Bergland*, 446 F.Supp. at 4. If I determine that agency action has a rational basis, I must affirm that action even though I disagree with the agency's decision. *Bowman Transportation, Inc.* v. *Arkansas-Best Freight System, Inc.*, 419 U.S. at 290. Finally, if the agency interpretation is of an administrative regulation, I must show a high level of deference to that interpretation. *Udall* v. *Tallman*, 380 U.S. 1 (1964).

The Grynberg Trust

The terms of the prohibition against multiple filing in §3112.5-2 are not restricted to those instances where the applicants are owners. The regulation provides in pertinent part:

> When any person, association, corporation, or other entity or business enterprise files an offer to lease for inclusion in a drawing, and an offer (or offers) to lease is filed for the same lands in the same drawing by any person or party acting for, on behalf of, or in collusion with the other person, association, corporation, entity or business enterprise, under any agreement, scheme, or plan which would give either, or both, a greater probability of successfully obtaining a lease, or interest therein, in any public drawing, held pursuant to §3110.1-6(b), all offers filed by either party will be rejected.

The Interior Board of Land Appeals has held a variety of oil and gas interests sufficient to violate this provision. *See e.g., William R. Boehm*, 36 I.B.L.A. 346 (1978); *Panra Corporation*, 27 I.B.L.A. 220 (1976); *Richard Donnelly*, 11 I.B.L.A. 170 (1973); *Schermerhorn Oil Corporation*, 72 I.D. 486 (1965).

The first basis upon which the board found a prohibited multiple interest to exist is where parents, and their children's trust file simultaneous offers for the same parcel. *Grynberg Trust*, 44 I.B.L.A. at 202. To reach this conclusion the trust instrument was examined to ascertain the interests of the beneficiary relative to his parents and to Celeste Grynberg as co-trustee. Article VI of the trust agreement delineates support provisions and provides:

> It is the grantor's wish that the term "best interests" of the beneficiary be liberally construed and include not only the possibility of distributions for the *support, medical care and education (including professional education of said beneficiary but also the*

> *possibility of distributions for his comfort, convenience and happiness.* As illustrations, and not in limitations of the purposes for which distributions can be made under such standard, the trustee may make distributions or permit said beneficiary to travel for education or pleasure purposes or permit said beneficiary to purchase a personal residence or invest in a business. (Emphasis added.)

Parents are liable for the support obligations contemplated by the trust agreement. *Perkins* v. *Westcoat*, 3 Colo. App. 338, 33 P. 139 (1893) (support in general); *Union Pac. R. Co.* v. *Jones*, 21 Colo. 340, 40 P. 891 (1895) (medical expenses); *Haynes* v. *Haynes*, 41 Colo. App. 469, 586 P.2d 1010 (1978) (divorced parent may be liable for college education expenses); *VanOrman* v. *VanOrman*, 30 Colo. App. 177 (1971) (college education expenses). Any payment from the trust regarding these items would fulfill the obligation of the parents to support their child. Therefore, the success of this trust directly benefits the parents.

Plaintiffs argue, however, that the language of Article IV, Section 1 of the trust agreement is controlling. This article states:

> *Income and Principal.* The trustee is hereby authorized in the sole discretion of the trustee at any time and from time to time, to distribute all or any part of the income and/or principal of each separate trust to the beneficiary of such trust, as the trustee deems desirable for the best interests of said beneficiary, or to accumulate all or any part of such net income and the same to the principal of such trust, to be held, administered and distributed as a part thereof; provided, however, *that no distribution shall be made pursuant to this section which would satisfy a legal obligation of the Grantor.* (Emphasis added.)

Plaintiff's argue that given this provision, the legal obligation of the parents to support their children is undiminished by the trust, since in Colorado assets of a minor may not be used by parents for the support of such minor unless the parents are unable to furnish support. *Perkins* v. *Westcoat*, 3 Colo. App. 338, 33 P. 139. However the board decision correctly points out that the language in Art. IV could not be used to deny a child in want, for to do so would negate the specific directions of the trust. Thus, in a financially disastrous situation, although such a possibility may be remote, the parents could use the trust assets for the financial support of the children. The trust instrument also provides for such payments to be made directly to the child's guardian. Trust Agreement, Art. VIII, Sec. 2. Hence there is a benefit to the parents in the possibility of direct support payments for the child. *Farrel L. Lines, Trustee and Winston Trust*, 40 I.B.L.A. 91, 96. [1]

Plaintiff's contend that the possibility of a financial disaster so devastating to the Grynbergs that they would be unable to support their children is so remote that it cannot constitute a benefit such that a prohibited multiple filing exists. This argument is unpersuasive. While the chance of financial disaster may indeed be remote, if in fact it does occur, the parents will directly benefit from the trust. In addition, the parents receive the present and immediate benefit of knowing that if such a disaster were to occur, the trust assets of their children could be used to support them. Given the language of the trust agreement, there is no basis for

---

1. *Farrel* also raises a similar point. The board states:

"..., except in the most extraordinary circumstance, it would be sophistry to contend that the minor children of a family unit have no beneficial interest in the relative wealth or poverty of their parents. Therefore, even if the parents were successful in insulating themselves entirely from enjoyment of any advantage derived from the assets of their minor children, it would still be necessary,..., to demonstrate that the children's circumstances would remain unchanged regardless of whether their parents attained great wealth or were pauperized.

finding the board's interpretation arbitrary, capricious, abusive of discretion, or otherwise not in accordance with law.

The second basis upon which the board found a multiple filing was filing by a co-trustee individually and also on behalf of the trust. *Grynberg Trust*, 44 I.B.L.A. at 203. The board reasoned that the duty of loyalty demanded of a trustee requires avoidance of any situation or transaction in which personal and fiduciary interests might conflict. The Restatement (Second) of Trusts, §170 states that a trustee violates his duty to the beneficiary if he enters into a substantial competition with the interests of the beneficiary. Also, the Tenth Circuit Court of Appeals has specifically held that a trustee may not compete with his beneficiary in the acquisition of property. *Wootten* v. *Wooten*, 151 F.2d 147, 150, 161 ALR 1027 (1945). *See also*, 2 *Scott on Trusts*, §170.21 (3rd Ed. 1967). Therefore, the board concluded, since the trustee would be deemed to hold his personal offer in trust for the beneficiary, filing by a co-trustee individually and also on behalf of the trust is a prohibited multiple filing, requiring the rejection of the offers. *See McKay* v. *Wahlenmaier*, 226 F.2d 35 (D.C. Cir. 1955).

Plaintiff's contend that since the trust agreement, Art. 8, Sec. I(j), expressly authorizes the trustee to invest and reinvest in oil, gas, or other mineral interests, such conduct cannot be a breach of trust. This argument is likewise without merit. That a trustee may properly file a simultaneous drawing entry card in the name of a trust for a minor is well settled and not in dispute. *Margo Panos Trust*, 28 I.B.L.A. 1 (1976). The question, however, is whether the trustee can also file as an individual in the same drawing. Plaintiffs claim that since the grantor, Jack Grynberg, was regularly making oil and gas investments when the trust was formed, there would be no breach of the trustee's fiduciary duty by simultaneously filing as a trustee and as an individual. However, authorization for the trustee to invest in oil, gas, and mineral interests on behalf of the trust and on his own behalf is not authorization to compete for identical interests as trustee and as an individ-

ual. In addition, in this jurisdiction a trustee cannot compete with his beneficiary in the acquisition of property. *Wootten* v. *Wooten*, 151 F.2d at 147. Hence, in a breach of trust suit by the beneficiary of the trust, the beneficiaries would prevail, as in *Wahlenmaier*. Thus, the trustee would have gained an unfair advantage for the trust.

Plaintiffs also contend that there was not "substantial" competition, as required by the Restatement of Trusts. Plaintiffs also argue that *Wahlenmaier* is readily distinguishable from the instant case. In *Wahlenmaier*, the president and vice-president of a corporation filed on behalf of themselves and the corporation. The president of the corporation obtained first priority on the lease. The court held that the president was in a fiduciary relationship with the corporation and that in a suit by the stockholders he would be found to hold the lease in a fiduciary capacity for the use and benefit of the corporation. Hence, there was a prohibited multiple filing. Given *Wootten* a similar result would be reached here and the trustee would be deemed to hold the lease in a fiduciary capacity for the use and benefit of the trust. Contrary to plaintiff's contentions, the fact that the faultless beneficiary would be penalized by losing the lease rather than the officer who breached his fiduciary duty is immaterial. The other people filing for the lease were also faultless and they have been harmed by plaintiff's multiple filing on the parcel in question. Similarly, the fact that secretive and deceitful actions, found in *Whalenmaier*, did not take place in this case is also immaterial. As the board correctly points out, it is not necessary that the parents have conspired to evade the regulations. If the applicant is effectively given a greater chance of success in the drawing, it is inherently unfair whether there has been collusion or not. *Richard Donnelly*, 11 I.B.L.A. 170; *Schermerhorn Oil Corporation*, 72 I.D. 486 (1965).

The board's interpretation of *Whalenmaier* and its reasoning regarding the fiduciary relationship of a trustee to his beneficiary is not arbitrary, capricious, abusive of discretion

or otherwise not in accordance with law. Summary judgment in favor of the defendants is appropriate.

June Oil and Gas, Inc. and Cook Oil and Gas, Inc.

The board found that June Cook owns 100 per cent of June Oil and is chairman of its board of directors. Michael Cook owns 100 per cent of Cook Oil and is chairman of that corporation. At the time of the lease offers, the officers of each corporation were as follows:

	June Oil	Cook Oil
President/director	Michael Cook	June Cook
Secretary/treasurer/ director	Adrianna Van Der Stok	Adrianna Van Der Stok
Vice-President for land administration	Madeline A. Meyer	Kati P. Ward

All of these directors, including the chairmen of the boards, and officers were authorized to sign on behalf of their corporations with respect to oil and gas leasing matters. The articles of incorporations for each company state identical purposes, list the same incorporators, and designate initial registered officers with the same address. In fact the articles of incorporation are identical except for the names of the initial directors and registered agents. They were executed and filed with the State of Colorado on the same date. The two corporations have the same address, same business facilities and same personnel. *June Oil Gas, Inc. and Cook Oil and Gas, Inc.*, 41 I.L.B.A. 394, 396-397.

The board relied on *Schermerhorn Oil Corp.*, 72 I.D. 486 (1965) to find a prohibited multiple filing in this case. In that case Kenwood Oil Corp. and Schermerhorn Oil Corp. both filed offers for a single parcel. The offers were rejected for two reasons. First, it was found that Schermerhorn Oil Corp. owned 29 per cent of the stock of Kenwood Oil Corp. Therefore Schermerhorn had a one and one-fourth chance of obtaining a lease thereby creating an inherently unfair situation despite lack of collusion between the parties. The board also rejected Kenwood's offer because of the interrelationship

of the two companies. The board noted that the companies had the same officers, shared the same street address, filed at the same time, made identical offers, were represented by the same attorneys and submitted identical briefs in the proceedings before them. *Id.*, 72 I.D. 490-491. This is very similar to the instant case and is sound authority for finding that there was a prohibited multiple filing.

Plaintiffs correctly point out that in *Schermerhorn*, one corporation owned stock in the other, while in this case the corporations are independently owned. However, in *Schermerhorn* the board also rested its decision on the interrelatedness of the two companies, thereby creating an unfair advantage for both of them. Plaintiffs are also incorrect about the requirement of finding collusion of the parties. Such a finding is not necessary, according to *Schermerhorn*, when an inherently unfair situation, as in the present case, is created.

The board also applied the theory delineated in *Wahlenmaier*. There, it was held that when an officer of a corporation files on behalf of the corporation and on his own behalf he is usurping a corporate opportunity and thereby breaching his fiduciary duty to the corporation. As a result he holds it in trust for the corporation creating a prohibited multiple filing. In this case, by being a director in both corporations and filing on behalf of both corporations for the same parcel, there is a breach of fiduciary duty to one corporation when a second filing is made for the other because the first corporations chances of obtaining a lease are lessened by the second filing. Such dual filings could be justified only if they were beneficial to both; that is if they increased each corporations opportunity of obtaining an interest in the desired lease. As such the corporations are gaining unfair advantage and thereby provide additional support for finding a prohibited multiple filing.

Plaintiffs have not carried their burden of showing the agency's decision was arbitrary, capricious, abusive of discretion or otherwise not in accordance with law. Summary judgment in favor of the defendants is appropriate.

In both cases the agency has carried out its duty of protecting other offerors from being put to an unfair advantage and providing each with an equal opportunity of obtaining an interest in the leases. The board has acted in accordance with the regulations and its past decisions. The defendants' interpretation of regulations is given deference and will not be overturned merely because reasonable minds can differ. It is therefore

ORDERED that Celeste Grynberg and Dean Smernoff's motion for summary judgment is denied and defendants motion for summary judgment is granted. It is further

ORDERED that June Oil and Gas, Inc. and Cook Oil and Gas, Inc.'s motion for summary judgment is denied and defendants motion for summary judgment is granted. Each party to bear his, her or its own costs.

DATED at Denver, Colorado this 16th day of January, 1981.

/s/

United States District Judge

United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS

INTERIOR BOARD OF LAND APPEALS

4015 Wilson Boulevard

Arlington, Virginia 22203

JUNE OIL AND GAS, INC.

COOK OIL AND GAS, INC.

IBLA 79-4 Decided July 24, 1979

Appeal from a decision of the Colorado State Office, Bureau of Land Management, rejecting appellants' simultaneous oil and gas lease offers, C-26939 and C-27026.

Affirmed.

1. Oil and Gas Leases: Applications: Drawings — Oil and Gas Leases: Applications: Filing

   Where offers for the same parcel of land are filed by two corporations in a simultaneous oil and gas lease drawing, and where the directors of the first corporation having authority to file offers and execute leases are directors of the second with the same authority and the surrounding circumstances suggest that the corporations are interrelated, the drawing is inherently unfair and the offers are properly rejected as a prohibited multiple filing. Collusion or intent to deceive the Department need not be shown.

APPEARANCES: Philip G. Dufford, Esq., Welborn, Dufford, Cook and Brown, Denver, Colorado, for both appellants; Lyle K. Rising, Esq., Office of the Denver Regional Solicitor, Department of the Interior, for the Government.

OPINION BY ADMINISTRATIVE JUDGE BURSKI

In June and July 1978, June Oil and Gas, Inc., and Cook Oil and Gas, Inc., submitted offers for the simultaneous oil and gas lease drawings held by the Colorado State Office, Bureau of Land Management (BLM). Specifically, both corporations submitted drawing entry cards for parcel No. CO-337 in the June drawing and for parcel No. CO-361 in the July drawing. June Oil and Gas, Inc., received first priority on parcel No. CO-337 and second priority on parcel No. CO-361. Cook Oil and Gas, Inc., received no priority on parcel No. CO-337 as its card was not drawn, but received first priority on parcel No. CO-361. After review of the qualifications file for each corporation, BLM concluded that the corporations were interrelated and thus had gained a greater probability of succesfully obtaining a lease or an interest in a lease in the drawing when both submitted offers on the same parcels. Therefore BLM rejected the priority offers stating that a multiple filing in violation of 43 CFR 3112.5-2 had occurred and citing in support of the decision, *Schermerhorn Oil Corp.*, 72 I.D. 486 (1965). Both corporations have appealed that decision and the cases were consolidated for review.

The relevant portion of 43 CFR 3112.5-2 states:

> When any person, association, corporation, or other entity or business enterprise files an offer to lease for inclusion in a drawing, and an offer (or offers) to lease is filed for the same lands in the same drawing by any person or party acting for, on behalf of, or in collusion with the other person, association, corporation, entity or business enterprise, under any agreement, scheme, or plan which would give either, or both, a greater probability of succesfully obtaining a lease, or interest therein, in any public drawing, held pursuant to §3110.1-6(b), all offers filed by either party will be rejected.

Review of the corporate qualifications files maintained by the Colorado State Office for each corporation indicates that June Cook owns 100 percent of June Oil and Gas, Inc., and is chairman of the board of directors. Michael C. B. Cook owns 100 percent of Cook Oil and Gas, Inc., and is also chairman of the board of that corporation. At the time that the lease offers which are the subject of this appeal were made, the officers of each corporation were as follows:

	June Oil and Gas, Inc.	Cook Oil and Gas, Inc.
President/Director	Michael C. B. Cook	June Cook
Secretary/Treasurer/ Director	Adrianna van der Stok	Adrianna van der Stok
Vice President for Land Administration	Madeline A. Meyer	Kati P. Ward

All of these directors, including the chairmen of the boards, and officers were authorized to sign on behalf of their corporations with respect to oil and gas leasing matters.

The Articles of Incorporation for each company state identical purposes,[1] list the same incorporators, and designate initial registered offices with the same address. In fact, the Articles of Incorporation for each are identical except for the names of the initial directors and registered agent of each. The Articles of Incorporation were executed on the same day and filed with the State of Colorado on the same day. The two corporations continue to have the same address and, as noted

1. The third provision of both Articles of Incorporation reads in relevant part:

"(a) Purpose. The nature, object and purposes of the business to be transacted shall be as follows:

"(i) To acquire and obtain interests in oil and gas leases.

"(ii) To develop oil and gas leases.

"(iii) To acquire and engage in other businesses. To acquire (for cash or in exchange for its assets or securities or otherwise) operate, dispose of and otherwise deal and engage in any lawful business or activity for which corporations may be organized under the laws of Colorado."

in appellants' statement of reasons and brief, share business facilities and personnel for purposes of convenience.

Appellants argue that *Schermerhorn Oil Corp., supra*, is "irrelevant to the case at issue" because neither of the two corporations own stock in the other as did Schermerhorn and thus no unfair advantage was gained by both corporations having filed. In addition, appellants assert that a multiple filing does not occur when the cards are filled out by the same person if they were signed by different persons. Appellants further claim that the sharing of common facilities for business purposes does not constitute a multiple filing unless some agreement exists that the participants will mutually benefit from each other's offer.[2]

We would agree with appellants' argument that *Schermerhorn Oil Corp., supra*, is distinguishable, though only in part, because the two corporations are independently owned. However, we do not agree that the *Schermerhorn* decision is irrelevant to the cases at issue. In that case, one corporation, Schermerhorn, held a 29 percent stock interest in a second, Kenwood. The Deputy Solicitor ruled that when both corporations filed a lease offer for the same parcel of land, Schermerhorn had 1¼ chances of success because of its ownership of Kenwood stock. Thus the drawing in which they participated was inherently unfair whether or not there had been collusion or intent to deceive the Department and the Schermerhorn lease offer was properly rejected. Appellants correctly argue that this is not the situation we have before us now.

---

2. Appellants cite *D.E. Pack*, 30 IBLA 166, 84 I.D. 192 (1977), as support for this proposition. However, *Pack* does not involve the sharing of common facilities for business purposes but rather the use of a filing service by an oil and gas lease applicant. The Board held that where an applicant files a lease offer through a leasing service under an arrangement where the applicant uses the leasing service's address and avails himself of other services, but no enforceable agreement is entered into which would require the applicant, if successful, to transfer any interest in the lease to the leasing service, then the service is not a party in interest.

However, in *Schermerhorn Oil Corp., supra,* rejection of the Kenwood offer was upheld as well because of the additional finding that all of the officers of Schermerhorn with authority to execute offers and leases were also officers of Kenwood with the same authority. Similar circumstances are present in the cases now at issue. Here June Cook, the sole stockholder and chairman of the board of June Oil and Gas, Inc., is a director and officer of Cook Oil and Gas, Inc. Similarly, Michael C. B. Cook, the sole stockholder and chairman of the board of Cook Oil and Gas, Inc., is a director and officer of June Oil and Gas, Inc. In addition, the two corporations have a common secretary-treasurer/director. The sole office held by different persons for each corporation is that of Vice President for Land Administration. As previously noted, all directors and officers of each corporation may execute oil and gas offers and leases on behalf of their corporations. Consequently, as in *Schermerhorn Oil Corp., supra,* director/officers common to both corporations may file lease offers for the same land on behalf of both corporations.

The directors of a corporation are its governing body. They generally exercise all powers vested in the corporation and are responsible for the management of ordinary corporate affairs as well as the management, control, and use of corporate property. 19 C.J.S. *Corporations* § 742 (1940). In *Panra Corp.*, 27 IBLA 220 (1976), the Board quoted the following statement concerning the duties of corporate directors and officers from *Alvest, Inc.* v. *Superior Oil Corp.*, 398 P.2d 213 (Alaska 1965):

> A corporate officer or director stands in a fiduciary relationship to his corporation. Out of this relationship arises the duty of reasonably protecting the interests of the corporation. It is inconsistent with and a breach of such duty for an officer or director to take advantage of a business opportunity for his own personal profit when, applying ethical standards of what is fair and equitable in a particular situation, the opportunity should belong to the corporation.

> Where a business opportunity is one in which the corporation has a legitimate interest, the officer or director may not take the opportunity for himself. If he does, he will hold all resulting benefit and profit in his fiduciary capacity for the use and benefit of the corporation. [Citations omitted].

398 P.2d at 215. The Board has previously held that when a director or officer of a corporation individually files a lease offer for the same land as the corporation itself files, a prohibited multiple filing occurs because the individual filing constitutes the taking of a corporate business opportunity for personal profit. Such action is a breach of the director's or officer's fiduciary duty to the corporation and thus the profit accruing to that individual must be held for the corporation's benefit. As a result, the corporation will have had two chances to obtain the oil and gas lease. *William R. Boehm*, 36 IBLA 346 (1978); *William R. Boehm*, 34 IBLA 216 (1978); *Graybill Terminals Co.*, 33 IBLA 243 (1978); *Panra Corp., supra. See McKay* v. *Wahlenmaier*, 226 F.2d 35, 44-46 (D.C. Cir. 1955). We find this principle also applicable to the present cases as it defines the relationship between June Oil and Gas, Inc., and Cook Oil and Gas Inc., and identifies the problem which occurs when both file lease offers. In most instances, directors with fiduciary obligations to two competing corporations cannot reasonably protect and promote identical interests in a single business opportunity for the two corporations at the same time. When a business opportunity, such as filing for an oil and gas lease, arises which is equally appropriate for either corporation, the directors cannot take the opportunity for one of the corporations without breaching their duty to the other unless the corporations are in fact not competing and the action is beneficial to both regardless in whose name the action is taken. Therefore, in most instances, if directors decide to file offers on behalf of both corporations, they also will breach their fiduciary duty to each because the second filing lessens the chance of success of the first offeror as between two competing offerors. Such dual filings could only be justified if they were beneficial to both corporations; that

is, if they increased each corporation's chance at successfully obtaining an interest in the sought-after lease.[3]

The drawing entry cards at issue in these cases were signed on behalf of each corporation by the one officer who is neither a director nor common to both corporations.[4] We hold that this fact does not change the result in this instance given the interlocking management responsibilities of the directors and the other common characteristics outlined at the beginning of this opinion. June Oil and Gas, Inc., and Cook Oil and Gas, Inc., are so interrelated by virtue of their common director/officers and these other factors that it is difficult to define where the interests of each of the corporations begin and where they end. We would note further that appellants also apparently view themselves as having the same interests since they are represented by the same counsel in this case and one brief was submitted on behalf of both corporations. Where all of the circumstances so strongly suggest such com-

---

3. The seventh provision of the Articles of Incorporation of each corporation appears to broadly relieve the corporations of the effect of interested or of common directors or officers in any corporate transaction. It reads in part:

"SEVENTH: The following provisions are inserted for the management of the business and for the conduct of the affairs of the corporation, and the same are in furtherance of and not in limitation or exclusion of the powers conferred by law.

"No contract or other transaction of the corporation with any other persons, firms or corporation, or in which this corporation is interested, shall be affected or invalidated by (a) the fact that any one or more of the directors or officers of this corporation is interested in or is a director or officer of such other firm or corporation;***."

The Board submits that closely-held corporations cannot unilaterally act to relieve themselves of obligations under Federal oil and gas leasing laws. In this instance, it would be particularly self-serving, given the other common characteristics, for the corporations to attempt to claim on the basis of such a provision that the director's interests cannot be considered with respect to the multiple filings issue.

4. The fact that the cards were apparently filled out by the same person is significant as evidence of joint operations and awareness of the two corporations that both were filing on the same parcels of land.

mon interests as to have made the drawing inherently unfair, collusion or intent to deceive the Department need not be shown. BLM has properly rejected their offers as a prohibited multiple filing.

Appellants suggest that it would be a rule without a purpose to prohibit the conduct of two corporations where the sole owners of each of the corporations could have filed on exactly the same parcels in the same manner in their individual capacities as husband and wife.

Appellants are correct in their contention that a husband and wife may individually file for the same parcel of land in a simultaneous drawing without running afoul of either the sole party in interest requirement or the multiple filing prohibition. *See generally, Solicitor's Opinion,* M-36416 (Feb. 27, 1957); *Solicitor's Opinion,* M-36418, 64 I.D. 51 (1957). This argument, however, is not apropos to appellants' situation.

June and Michael Cook, each the sole owner of one of the corporations, are not citizens of the United States, but of the Netherlands (June) and Great Britain (Michael). Under the statute and regulations, aliens may not acquire or hold any direct or indirect interest in leases, except through ownership or control of stock in corporations holding oil and gas leases, provided that the laws of the alien's country do not deny similar privileges to citizens of the United States. *See* 30 U.S.C. § 181 (1976); 43 CFR 3102.2-1(a). Thus, in actual fact, neither June Cook nor Michael Cook could have filed for an oil and gas lease in their own name. It is only through the ownership of stock in a corporation that either can hold any interest in an oil and gas lease.

Moreover, the rule prohibiting multiple filings would be without substantial efficacy if two corporations as closely identified as June Oil and Gas, Inc., and Cook Oil and Gas, Inc., were allowed to file mutually beneficial lease offers simply because they were controlled by husband and wife. The issue in this case is not the marriage relationship of the controlling shareholders; rather, it is the nature of the two corpo-

rations themselves. Having availed themselves of the benefits attendant to the corporate structure, the owners cannot simultaneously request that their actions be treated as if no corporation actually existed.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

/s/
James L. Burski
Administrative Judge

We Concur:

/s/
Edward W. Steubing
Administrative Judge

/s/
Joan B. Thompson
Administrative Judge